IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4006 of 1987

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAJENDRASINH V CHAUHAN - Petitioner
Versus
STATE OF GUJARAT & 3 - Respondents

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Appearance :

MR BIPIN I MEHTA for Petitioner:
MR HEMANT MAKWANA, LD. AGP for Respondent: 1,
MR UM SHASTRI for Respondent: 2,
MR BM MANGUKIYA for Respondent: 3,
RULE NOT RECD BACK for Respondent: 4.

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 26/09/2007

ORAL JUDGMENT

1. The petitioner under Article 226 of the Constitution of India has challenged inter alia

the order of District Development Officer passed on 20/9/1984 suspending Resolution No. 40 dated 17/7/1984 passed by the then Lunawada Nagar Panchayat (now Lunawada Borough) promoting and appointing the petitioner from the post of Accountant to the post of Secretary w.e.f. 17/7/1984 on retirement of the then Secretary on his attaining the age of superannuation; on the ground that the Resolution No. 40 passed by Lunawada Nagar Panchayat was not in consonance with the instructions of the State contained in communication dated 19/3/1983. The Resolution was suspended under Section 294 of the Gujarat Panchayat Act, 1961.

2. The facts in brief deserve to be set out as under:-

The petitioner who was an employee of Lunawada Nagar Panchayat had originally been appointed as Naka Karkoon on 6/5/1957. Thereafter he was promoted as Accountant in 1972. Petitioner was given charge of the post of Secretary on 21/1/1984 as per the prevailing rules & regulations. The qualification for the post of Secretary was matriculation and passing of Local Self-Government Diploma and 2 years experience in Municipality. Petitioner took the examination of Local Self-Government Diploma in March 1984, petitioner was declared successful on 12/6/1984. Petitioner submitted application on 3/7/1984 to the Chairman,

Lunawada Nagar Panchayat Committee stating that as he possessed qualification and he has passed the Local Self Government Diploma Examination he be considered and promoted to the post of Secretary. The Lunawada Nagar Panchayat considered the application positively and passed resolution dated 17/7/1984 in its general meeting being Resolution No. 40 and resolved that as the post of Secretary was vacant due to retirement of the then Secretary Shri. P.J. Dave, and as petitioner was possessing requisite qualification for the post of Secretary, and as he was also holding charge of the post of Secretary and had put in 27 years service in Panchayat he was promoted to the post of Secretary in the pay scale of Rs.500-900. The respondents State issued necessary administrative instructions vide communication dated 19/3/1983 in view of the decision of the Apex Court in case of STATE OF GUJARAT AND ANOTHER V. RAMAN LAL KESHAV LAL SONI AND OTHERS, reported in AIR 1984 SC 161, providing moratorium on filling the post by way of direct recruit or promotion. The instruction dated 19/3/1983 were taken into consideration by District Development Officer and he was of the view that the Resolution of Lunawada Nagar Panchayat no. 40 dated 17/7/1984 was not in conformity with the directions of the State Government and therefore in exercise of power under section 294 (4) of the Gujarat Panchayat

Act 1961 he suspended the same. It appears from the record that the Panchayat challenged this order of District Development officer before the Development Commissioner and the Development Commissioner vide order dated 28/1/1985 confirmed the order of District Development Officer. Petitioner therefore was apprehending his reversion and as even thereafter he was permitted to continue as Secretary approached this Court by way of present petition under Article 226 of the Constitution of India.

3. This Court on 13/8/1987 [Coram: R.J. Shah, J (as he then was)] ordered maintaining status quo as on date and thereafter the interim relief has been continued. At one point of time on 30/12/1988 this Court [Coram: M.B. Shah,J (as he then was)]subsequently made an order to District Development Officer to consider case of the petitioner and as no decision was taken this Court [Coram: R.A. Mehta,J (as he then was)] had to make an order for District Development Officer's presence in the Court for explaining non compliance with order dated 30/12/1988. Petitioner has retired on attaining the age of superannuation and it is a statement made at the Bar by Shri. Mehta learned counsel for the petitioner that till the age of superannuation petitioner discharged his duty as Secretary to the Panchayat. The petitioner, however is not receiving pensionary benefits / retiral benefits

on the post of promotion to the post of Secretary.

4. Shri. Mehta, learned counsel appearing for the petitioner has submitted that the original rules came to be amended where under the local cadre which is subject matter of this petition and in Nagar Panchayats were subsequently excluded and thereafter subsequently only on 18/5/1985 after the decision of Apex Court in State Vs. Raman Lal Keshav Lal Soni (supra) they were again included in the purview of the recruitment procedure. Therefore as the petitioner came to be appointed in the interregnum period by the Panchayat in its general body meeting by Resolution No. 40 dated 17/7/1987 his appointment was absolutely just and proper and valid and the Panchayat as such had competence to appoint the petitioner as Secretary. The District Development Officer at the relevant time was not justified in exercise of his power under section 294 of the Panchayat Act on the ground that Resolution No. 40 dated 17/7/1984 was not in consonance with the directives and instructions received by Government vide communication dated 19/3/1983. Shri. Mehta submitted that District Development Officer if he could take into consideration the instruction dated 19/3/1983 as well ought to have taken into consideration subsequent directives issued by way of Resolution dated 27/12/1983 and the

directives dated 13/3/1985 in regard to filling up of post on converted Gram / Nagar Panchayats. Shri. Mehta has submitted that the petitioner was fulfilling all the requisite qualifications and at the relevant time the Resolution No. 40 dated 17/7/1984 came into being, Nagar Panchayat had power to make appointment to the post of Secretary by way of promotion and therefore the petitioner's promotion should have been treated regular promotion and the order of District Development Officer as well that of the Development Commissioner therefore deserved to be quashed and set aside.

5. Shri. Mehta has further submitted that as the order of suspending the Resolution No. 40 dated 17/7/1984 passed by District Development Officer had direct impact upon the civil rights of the petitioner as he was likely to be reverted from the post of Secretary, the same could not have been passed without affording an opportunity of being heard to the petitioner.

6. Shri. Makwana, learned AGP appearing for the State submits that, as the appointment of the petitioner by way of promotion to the post of Secretary vide Resolution No.40 dated 17/7/1984 was in itself without authority of law and with requisite competence the District Development Officer was well within his power to suspend

execution of the same and exercised his power under Section 294(4) of the Panchayat Act 1961. The order of District Development Officer has also been rightly considered by the Development Commissioner. Shri. Makwana has invited this Court's attention to the observations of the Supreme Court in case of State Vs. Raman Lal Keshav Lal Soni (supra) and submitted that the entire amendment of 1978 to the Panchayat Act 1961 was found to be repugnant and therefore the same was quashed. The State Government therefore was required to issue necessary orders. In fact the Amendment of 1978 was challenged by the employees of the Panchayat. However it is a case where the amendment itself was sought to be relied upon for effecting appointment of the petitioner to the post of Secretary by way of promotion. Shri. Makwana has submitted that right after the decision of the Apex Court in case of State Vs. Raman Lal Keshav Lal Soni (supra) the State Government issued Ordinance on 6/6/1984 where under the effect of earlier 1978 Amendment was taken away and Section 102 of Panchayat Act was amended. Now by virtue of this Amendment in regard to Panchayat no one possessed power of making appointment to the post of Secretary and therefore the Resolution of the Panchayat No. 40 dated 17/7/1984 was bad in law and therefore, it has rightly been suspended by District Development Officer in exercise of his power made under section 294 (4)

of the Gujarat Panchayat Act 1961. Shri. Makwana has also placed reliance upon the decision of this Court in case of RATIBHAI M. PATEL & ORS V. DISTRICT DEVELOPMENT OFFICER, MEHSANA, reported in 1999 (1) GLR, pg. 109, wherein an identical question arose before this Court and this Court [Coram: S.K. Keshote (as he then was)] was pleased to dismiss the petition. Shri. Makwana submitted that when the action of the Panchayat lack inherent power and was without authority of law the same was rightly suspended by District Development Officer and therefore District Development Officer was not required to afford an opportunity to the petitioner; whereas and in fact it was the Panchayat which was aggrieved and Panchayat was required to take up the matter at appropriate stage. Accordingly Panchayat had filed revision application before the Development Commissioner who in turn dismissed the same confirming the order of District Development Officer. Therefore as it is observed by this Court in case of Ratibhai M.Patel & Ors (supra) the requirement of hearing is also not warranted in such type of cases.

7. Shri. Mangukiya learned counsel appearing for the then Nagar Panchayat has submitted that the petition is suffering from the vice of non-joinder as the Lunawada Panchayat is no more exist and in its place Municipal Borough came into existence and therefore without joining

Lunawada Borough petitioner can not maintain and agitate this petition. Shri Mangukiya further submitted that the control of the State was all along there in the matter of recruitment to the post of Secretary and therefore though at the relevant time Nagar Panchayat had passed Resolution No.40 dated 17/7/1984 Panchayat did not have competence at the relevant time to pass such Resolution and therefore the petition deserves to be dismissed.

8. Shri. Shastri, learned counsel appearing for the District Development Officer has also submitted that the order of District Development Officer dated 20/9/1984 was proper and justified and therefore it has been rightly upheld by the Development Commissioner while rejecting the revision application filed by the Nagar Panchayat. He submitted that the petitioner has belatedly approached this Court under Article 226 of the Constitution of India and therefore this petition is also suffers from the vice of delay and laches.

9. This Court has heard learned counsels of respective parties at length and perused the record. It deserves to be noted that the controversy in this petition is in a narrow compass. The question which requires to be addressed is as to whether the Lunawada Nagar

Panchayat at the relevant time i.e. 17/7/1984 had competence to pass Resolution No.40 appointing petitioner by way of promotion to the post of Secretary without any consultation or approval by the State or its authority or delegated officers. In order to appreciate this question it is expedient to set out the Amendment of 1978 which is promulgated as Gujarat Panchayat (3rd Amendment) Act 1978 wherein under Section 102 it has been amended. The same is set out as under.

" In the principal Act, in Sec.102:

(1)for sub-section (1), the following sub-section shall be substituted, namely :-

"(1) (a) Subject to the provisions of this Act and the rules made thereunder there shall be a secretary for every gram panchayat and nagar panchayat who shall be appointed in accordance with the rules:

Provided that where on account of conversion of a municipality into a gram panchayat or a nagar panchayat under section 307, an officer of a municipality becomes a secretary of such panchayat or where any person not being a talati-cum-panchayat secretary is appointed as a secretary to such panchayat, such secretary shall not be governed by the rules so made and the rules for regulating recruitment, and conditions of service of such secretary shall be such as the panchayat may, subject to general or specific order of the State Government, by its resolution determine:

Provided further that the State Government having regard to the population of a gram and

income of the panchayat thereof may direct in respect of a group of gram panchayats that such group shall have one secretary and thereupon there shall be one secretary for that group.

(b) A gram panchayat or, as the case may be, a nagar panchayat may, subject to general or special order of the State Government, appoint such servants as may be necessary for the proper exercise of its powers, discharge of its duties and performance of its functions under this Act, and the rules for regulating recruitment and conditions of service of such servants shall be such as the panchayat may subject to like order by its resolution determine."

Now by virtue of this amendment in Section 102 the Panchayat so far as the local cadres were concerned, become empowered to appoint Secretary and other employees forming part of local cadres. After the decision of the Apex Court in case of State of Gujarat Vs. Raman Lal Keshav Lal Soni (supra) the State issued ordinance on 6/6/1984 which was known as the Gujarat Panchayat (Amendment(Ordinance 1984) and it was provided therein that it shall be deemed to have come into being on 10/7/1978. Thus the amendment had the effect of nullifying the amendment of 1978. The saving clause No.17 of this Ordinance read as under :-

"17.(1)(a)The Gujarat Panchayat (Third Amendment) Act,1978 and

(b) the Gujarat Panchayats (Amendment) Ordinance, 1984 are hereby repealed.

(2) Notwithstanding the repeal of the Gujarat Panchayats (Amendment) Ordinance,1984, anything done or any action taken under the principal Act as amended by the said Ordinance, shall be deemed to have been done or taken under the principal Act as amended by this Act. “

10.Against this backdrop the submission of Shri. Mehta deserves to be examined. The effect of Ordinance dated 6/6/1984 deserves to be taken into consideration in its proper perspective. Resolution No. 40 dated 17/7/1984 came into effect only on 17/7/1984. Admittedly subsequent to passing of the Ordinance and its effect and therefore the Nagar Panchayat could not have made appointment of the petitioner to the post of Secretary by way of promotion contrary to the rules which prescribed the mode of appointment to the post of Secretary wherein the power of making appointment to the post of Secretary in the local cadre were conferred upon Nagar Panchayat vide 1978 amendment were taken away. In view of this it can be said that the decision of District Development Officer was, though not entirely based upon this reasoning, not unjustified so as to smack of violation of Article 14 & 16 of the Constitution of India. The State was required to issue instructions on 19/3/1983 only in order to take care of the situation that was arising after the pronouncement of the Apex Court in case of State Vs.Raman Lal Keshav Lal Soni (supra).

Therefore in order to take care of the situation that may arise after pronouncement of the Supreme Court in case of State of Gujarat Vs. Raman Lal Keshav Lal Soni (supra), the necessary instructions were required to be issued on 19/9/1983. Therefore the District Development Officer's reasoning can not be said to be not germane to the controversy in question. Therefore it has rightly been upheld by the Development Commissioner.

11. Shri Mehta in the alternative has submitted that in fact the petitioner has discharged his duty as Secretary and therefore in case this Court is not accepting the petition, the respondents may atleast be retrained from effecting recovery. This submission of Shri. Metha is without prejudice to his earlier submission that the petitioner had been rightly appointed by promotion to the post of Secretary by the Panchayat.

12. Shri. Mehta's alternative submission with regard to direction for not recovering the dues of salary deserves positive consideration. As it could be noted from the affidavit in reply, the petitioner at the relevant time had possessed requisite qualification for appointment to the post of Secretary by way of promotion. This Court [Coram: M.B. Shah (as he then was)] vide

order dated 30/12/1988 has passed order which reads as under:-

“ Order:

District Development Officer, Panchmahals has not verified whether petitioner was duly qualified to be appointed as Secretary of the Nagar Panchayat or not. Hence, D.D.O. Panchamahals, is directed to consider the qualification of the petitioner and decide whether he was duly qualified to be appointed as Secretary of the Nagar Panchayat. The District Development Officer also should consider whether he was the senior most person eligible to be promoted to the post of Secretary, Nagar Panchayat. D.D.O. shall decide the said question on or before 31.1.1989. “

As this order was not complied with, this Court [Coram: R.A. Mehta (as he then was)] again had to pass the following order 13/2/1989, which reads as under :-

“ The Dist. Development Officer Panchmahals was directed to decide certain questions by order dated 30-12-99 and the D.D.O. Was directed to decide on or before 31-1-1989 and the matter was adjourned to 2-2-'89. As no instructions were received from the D.D.O. The mater was adjourned to 13-2-'89. The learned counsel for the Dist. Development Officer is again without any instructions on the question of compliance with the Court's order dt. 30-12-'88. Therefore, the responsible and conversant officer of the D.D.O., Panchmahals is directed to remain in personally present in this Court on 20-2-'89 to explain why the Court's order is not complied with. S.o. to 20-2-1989. “

Despite this order the respondent did not consider the case of the petitioner for being regularised on the post of Secretary.

13. In view of the aforesaid observations it would be improper for this Court to hold otherwise than declaring that the Nagar Panchayat in fact did not have power of appointing present petitioner to the post of Secretary by way of promotion and the DDO order was not unjustified. However at the same time in view of the facts & circumstances attending this case the defect in appointment was absolutely curable and it deserved to be cured which has not been cured and the fact remains that the petitioner had been protected by order of this Court and the petitioner in fact discharged his duties all throughout as Secretary. Because of non acceptance of this petition the State may not be entitled to order recovery as otherwise petitioner was eligible to discharge his duty as Secretary and in fact he has discharged his duties as such and in fact the State was ordered long back to consider his case by this Court. As observed above, it would not be proper for the respondent to order the recovery. Therefore this Court while rejecting this petition is of the view that, in the interest of justice the State shall be restrained from ordering any recovery from the petitioner. At the same time it would be open to the petitioner to make an appropriate

representation to the Stat authorities for treating him to be regularly appointed Secretary and if such representation is made same shall be considered in accordance with law and its own merits, without being influenced by the dismissal of this petition.

14. With these observations the petition fails and is dismissed accordingly. Rule discharged. Interim relief, if any granted earlier, shall stand vacated. No cost.

[S.R. BRAHMBHATT, J]

/vgn